(1) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1995

MELVIN L. ROBERTS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA, YORK COUNTY, A BODY POLITIC AND A POLITICAL SUBDIVISION OF THE STATE OF SOUTH CAROLINA, AND GEORGE A. MARKERT, DIRECTOR OF COURT ADMINISTRATION,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FOR THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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Attorney at Law
Pro Se

BRIEF OF PETITIONER

Petitioner Melvin L. Roberts, hereby submits this Brief as his petition for a Writ of Certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the South Carolina Supreme Court erred in holding that the appointment of counsel for indigent dependents without adequate compensation does not constitute a taking of property where the burden on the attorney is not excessive and the appointment did not materially affect the income for the year in question?

2. Whether the South Carolina Supreme Court erred in holding that the Petitioner did not suffer a violation of the Thirteenth Amendment in prohibiting involuntary servitude because the attorney has voluntarily submitted himself to the appointments for indigents by the act of taking the oath of admission?

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FOR THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner Melvin L. Roberts, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered on April 3, 1995 with the Petition for Rehearing denied on May 4, 1995.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is opinion

number 24226 and is reprinted at Appendix A. The Order denying a rehearing is reprinted at Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on April 3, 1995 and a timely petition for rehearing was filed and subsequently denied on May 4, 1995. The jurisdiction of this Court arises under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides: "...nor shall private property be taken for public use, without just compensation."

2. The Thirteenth Amendment to the United States Constitution provides "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United

States, or any place subject to their jurisdiction."

3. The Fourteenth Amendment to the United States Constitution provides: "... no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction to the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, Melvin L. Roberts, hereinafter referred to as Roberts, filed a declaratory judgment action and complaint in the Court of Common Pleas for York County. Roberts was requesting that the hourly fee limitation of fee caps in non-capital cases established by South Carolina Code Ann. §17-3-50 (b) be declared unconstitutional on its face or

in the alternative as being unconstitutional as applied to Roberts in his representation of Tommy Lee Gordon. Roberts was appointed by the court to represent Tommy Lee Gordon, an indigent. Roberts requested $1,812.50 as attorney's fees for the time he spent in representing an indigent criminal defendant. Roberts sued both the State of South Carolina and York County as well as Louis S. Rosen who was the Director for Court Administration. The Defendants filed timely answers and pre-trial motions requesting that the complaint be dismissed for various reasons including that the statute did not affect an unconstitutional taking of property as well as affirmative defenses of sovereign immunity, exclusive jurisdiction and a lack of standing. Roberts subsequently amended his complaint and added causes of actions under 42 U.S.C. § 1983 for

violation of his constitutional rights including violation of the Thirteenth and Fourteenth Amendments. The court disposed of pre-trial motions and the trial judge entered an Order denying all of the defendants' pre-trial motions. This case came on for trial on April 14, 1993 before the Honorable Judge Buford Grier. The Trial Judge granted Roberts an award of $40.00 per hour for out-of-court work and $50.00 per hour for in-court work performed for representing Mr. Gordon. (R 19-21). Roberts filed a 59(e) motion as did the defendants. The Trial Judge denied the Rule 59(e) motions except for general findings of fact. All parties appealed to the South Carolina Supreme Court. South Carolina Supreme Court issued its decisions which are reprinted at Appendix A. and B.

Roberts is a private attorney in York County and has been practicing about 40

years. Roberts was appointed to represent Tommy Lee Gordon, who was an indigent defendant. Roberts was able, through the expenditure of 14.5 hours, work out a plea agreement with the solicitor under which Mr. Gordon pled guilty to a charge and received a suspended sentence and placed on probation. Roberts prepared a defense of indigents voucher seeking to be paid his usual hourly fee and submitted it to the Clerk of Court. The Clerk referred the defense of indigents voucher to the Administrative Judge who denied the fee request. Roberts requested to be compensated at his hourly rate of $125.00 per hour for the 14.5 hours expended in the representation of Tommy Lee Gordon.

The South Carolina Supreme Court held that the appointment of counsel without compensation does not constitute a taking of property where the burden on the

attorney is not excessive and relied upon South Carolina Department of Social Services v. Tharpe, ___S.C.___, 439 S.E.2d 854 (1994) in disposing of the case. The Court set forth that the appointment of the Petitioner did not materially affect his income for the year in question and since the number of hours spent on this case was minimal there was not a taking from Petitioner. In addition, Roberts asserted the State violated his Thirteenth Amendment right but the Supreme Court held that an attorney admitted to the Bar of the State of South Carolina voluntarily submits to the appointment of indigent representation by the act of taking the oath of admission and denied the Petitioner's Thirteenth Amendment challenge to the appointment.

REASONS FOR GRANTING THE WRIT

1. The South Carolina Supreme Court erred in holding that the appointment of counsel for indigent defendants without adequate compensation does not constitute a taking of property where the burden on the attorney is not excessive and the appointment did not materially affect the income for the attorney for the year in question.

This was error. In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), this Court held that indigents charged with serious crimes who may face incarceration are entitled to state provided counsel to protect their rights in the criminal process. The State of South Carolina and other states have shifted this U.S. Supreme Court mandate to the attorneys licensed to practice law in the state.

Petitioner was appointed to represent Gordon pursuant to the state's obligation

to ensure that an indigent criminal defendant's rights were protected and to ensure the proper functions of the adversarial nature of our penal system. The time which an attorney expends in the representation of a client is an attorney's only asset. Although this Court has never addressed specifically whether an attorney's time and talents are property subject to constitutional protection, the Supreme Courts of various states have held that an attorney's time is his property. Weiner v. Holton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966), Delisio v. Alaska Superior Court, 740 P.2d 437, 439 (Alas., 1987), Bedford v. Salt Lake County, 447 P.2d 193, 195 (Utah, 1968); Knox County Council v. State, 29 N.E.2d 405, 408 (Ind., 1940); Ferguson v. Pottawattamie County, 224 Iowa 516, 518, 278 N.W. 223 (1938); Kansas ex rel Stephen v. Smith and

Fromme, 747 P.2d 816 (Kans., 1987); Arnold et al v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991). As such, Petitioner asserts that his time and talent is his property. Since it is property. The state cannot take this property without just compensation.

In the opinion below, the South Carolina Supreme Court appears to recognize that the appointment of counsel to represent indigent defendants can constitute a taking of property. The reasoning of the Supreme Court of South Carolina is flawed because it presumes that an attorney's time in minimal amounts is not a property right whereas an attorney's time in large amounts can be a property interest and only when the attorney expends large amounts of time on a case is he entitled to compensation for his time. Petitioner submits that time, whether in small or large amounts, is his

compensable asset and requiring Petitioner to provide services for the county and the state with the threat of contempt of court does constitute a taking in violation of the Fifth and Fourteenth Amendments.

This Court recently addressed regulatory deprivations under the Fifth Amendment in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). Although the taking in this case deals with the attorney's time, it is directly analogous to this Court's reasoning in Lucas. In Lucas, supra, this Court held that when an owner of real property has been called upon to sacrifice all economically beneficial use in property in the name of common good, basically to leave his property economically idle, the property owner has suffered a taking within the meaning of the Fifth Amendment. Petitioner submits that the

state and county appointing him and requiring him to represent Tommy Lee Gordon is exactly the same situation. During those minutes and hours which Petitioner was representing Mr. Gordon, Petitioner could not expend his time representing other individuals for which he could have been paid. As such, Petitioner's time in representing Mr. Gordon prohibited him from using that time for any other income-producing purpose. Those hours were entirely taken by the state and county in this appointment. As such, Petitioner submits that he is entitled to compensation for his time as his property was taken.

The mere fact that a small amount of time was taken is not analogous to a regulatory taking which does not foreclose all possible uses of land. In a regulatory taking which enables a landowner to continue to use the land for

a purpose, the landowner has some benefit from the land. In a case where an attorney is required to expend his time in the representation of an indigent defendant, the attorney cannot use that time toward representing other individuals. As such, time expended on one criminal defendant is time taken away from other ventures. It is a complete and total taking of a property interest which the attorney enjoyed.

Petitioner also submits that not only is he entitled to compensation for his time but the compensation should be the rate at which others must pay him. As the Court in U.S. v. 69.1 acres of land, 942 F.2d 290 (4th Cir. 1991) set forth, just compensation is that amount of money necessary to put a land owner in as good a pecuniary position, but no better, as if his property had not been taken. Imminent Domain is an indispensable means

of constructing public improvements. Id. at 292. Petitioner submits that pursuant to the Fifth and Fourteenth Amendments, he is entitled to just compensation for his time. The compensation would be the amount Petitioner normally charges his clients had he and the client been willing to negotiate a price for the representation.

The Defendants have relied upon the South Carolina Code § 17-3-50 which provides for $10.00 per hour for out-of-court representation for indigents defendants and $15.00 per hour for work done in court which amounts are merely token compensations and are insufficient to make these statutes constitutional. The record at trial indicated clearly that criminal defense attorneys in York County charge between $125.00 and $150.00 per hour for work on criminal cases. Petitioner submits that just compensation

would entitle him to at least $125.00 per hour which was his rate at the time he represented Mr. Gordon. Roberts submits that there should be no distinction between the types of property in determining the basis of just compensation. For all types of property seized, market value should be the basis for determining the amount of just compensation. Petitioner adequately and fully provided evidence at the trial of this case which demonstrated. As such, Roberts submits that the South Carolina Supreme Court's Order denying him fees based upon the market value of his time was a denial of his constitutional rights and amounted to a taking of property without just compensation.

Petitioner is aware of the time honored tradition of attorneys representing poor people for little or no fee on a voluntary basis. Petitioner does

his full share of such voluntary work. However, voluntary work is not the same court-ordered work under threat of contempt and sanctions. If and when an attorney chooses to represent a particular poor client for a reduced fee or no fee, he makes the decision based upon the type of case, the worthiness of the cause, his available time and many other considerations. When he is ordered by the court to do so, he may be required to represent someone he would not voluntarily accept.

2. The South Carolina Supreme Court erred in holding that the Petitioner did not suffer a violation of the Thirteenth Amendment prohibiting involuntary servitude because the attorney has voluntarily submitted himself to the appointment for indigents by the act of taking the oath of admission.

The South Carolina Supreme Court's holding that Petitioner did not suffer a taking nor was he required to represent Tommy Lee Gordon through involuntarily servitude was in error because the Petitioner was required to represent Gordon through the threat of contempt of court. In order to have a claim for involuntary servitude prohibited by the Thirteenth Amendment, a showing of compulsion is a prerequisite. Flood v. Kuhn, 316 F.sep 271 (D.C.N.Y., 1970; Affd. 443 F.2d 264 (2nd Cir., 1971; Affd. 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2D, 728 (1972). The essence of slavery or involuntary servitude is that a worker has labored against his will for the benefit of another. Beltran v. Cohen, 303 F. Supp. 889, (D.C. Cal., 1969). The evidence presented at the trial of the case demonstrated that the Petitioner was forced to labor against his will for the

benefit of Gordon. "Involuntary servitude...means a condition of servitude in which the victim is forced to work for the defendant by use or threat of physical restraint or physical injury or by the use or threat of coercion through law or other legal process." U.S. v. Kozminski, 40 U.S. 931, 108 S.Ct. 2751, 101 L.Ed. 2d 788 (1988). Roberts testified at the trial of the case that he did not voluntarily agree to represent Mr. Gordon, that he represented Mr. Gordon under an order of the court with the threat of sanctions for refusal to represent Mr. Gordon. He testified that his representation of Mr. Gordon was involuntary in that he was ordered by the court to do so and failure to comply with the order could result in being held in contempt of court. Petitioner was forced to represent and work for the state and

county by use or threat of coercion through law or legal process.

The mere fact that an attorney took an oath upon admission to the Bar of the State of South Carolina does not mean that he voluntarily submitted himself for appointment to be required to represent indigents in this state. Nothing in the oath requires it.

To begin with, the attorney's oath sets forth "I will never reject, from any consideration personal to myself, a cause of the defenseless or oppressed, or delay any person's cause for lucrea or malice;" The oath does not set forth that an attorney has agreed to represent indigent defendants for free. The attorney's oath merely sets forth that he will not allow personal feelings to get in the way of helping the defenseless. This does not entitle the state to dictate to the attorney who he should represent. Also,

Petitioner submits that it is a condition of practicing law that he take the oath. A judicial order requiring all attorneys to take this oath and requiring an entire class of citizens, attorneys, to represent indigent defendants cannot be the basis for the justification of their appointment to represent indigent defendants.

Members of various professions have taken oaths but Petitioner is unaware of any oath that required an entire class of a profession to perform services for the general public for free. Petitioner submits that attorneys, including judiciary members, have not agreed to represent every individual who cannot afford to pay for the attorney's services. The state's imposition, through statute or court order, of this obligation upon an attorney, amounts to involuntary servitude. As such, South

Carolina Supreme Court should have held that the statutes and court orders requiring this Petitioner to represent Gordon violated the Thirteenth Amendment.

CONCLUSION

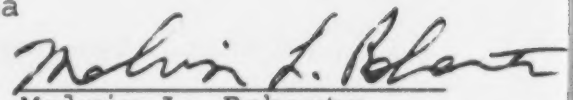
The State of South Carolina has refused to comply with the mandate in Gideon v. Wainwright, supra to provide counsel to indigent Defendants who may face incarceration. Instead, the State of South Carolina has put the burden on the attorneys licensed to practice in South Carolina. The real issue is, "who shall bear the expenses of providing counsel to indigent defendants in criminal proceedings-the states or the attorneys."

The South Carolina Supreme Court's decision has denied Petitioner property without just compensation and has violated the Petitioner's constitutional right against involuntary servitude. This

Court should accept Certiorari to address these matters.

Respectfully submitted.

York, South Carolina
July 26, 1995



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APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FOR THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Melvin L. Roberts,
Respondent/Appellant

vs.

State of South Carolina,
York County, a body politic
and a political subdivision
of the State of South Carolina,
and George A. Market, Director
of Court Administration,

Appellants/Respondents

Appeal from York County
J. Buford Grier, Master-in-Equity

Opinion No. 24226
Heard February 9, 1995
Filed April 3, 1995

REVERSED

Melvin B. McKeown, Jr. of Spratt, McKeown & Bradford of York, for appellant/respondent York County.

Edwin E. Evans, Special Assistant Attorney General, of State Budget & Control Board, of Columbia, for State of S.C., and George A. Markert.

Daniel D. D'Agostino, of Melvin L. Roberts & Associates of York, for respondent/appellant.

MOORE, A.J.: This appeal is from an order awarding attorney's fees for the representation of an indigent defendant in a non-capital case. We reverse.

F A C T S

Respondent-appellant (Attorney) practices law in York County. On April 8, 1991, he was appointed to represent an indigent non-capital defendant after the Public Defender's Office was relieved from representation because of a conflict of interest. Attorney spent a total of 14 1/2 hours working on the case. After the case was resolved by a guilty plea, Attorney submitted a Defense of Indigents voucher to the circuit court on which he deleted the statutory rates included on the voucher form and inserted the rate of $125 per hour for a total fee of $1,812.50. On April 29, 1991, the

administrative judge wrote on the voucher: "Denied and payment not authorized as the basis for the sum submitted exceeds the statutory rate." The statutory rate at the time was $10 per hour for out-of-court time and $15 per hour for in-court time with a cap of $500 in a non-capital case. S.C. Code Ann. § 17-3-50 (1985). 1

Subsequently, Attorney commenced this declaratory judgment action against the State, York County, and the Director of Court Administration alleging their failure to pay the bill he had submitted for services rendered and seeking a ruling the statutory fees were unconstitutional. The master held the statutory fees were so low as to

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1 This statute was amended effective July 1, 1993 and now provides for fees of $40 out-of-court and $60 in-court with caps of $3,500 in non-capital felony cases and $1,000 in misdemeanor cases. S.C. Code Ann. § 17-3-50 (Supp. 1993).

constitute a taking of property. Further, he held it was only "just and fair" that this Court's ruling in Bailey v. Aiken County, ___S.C. ___, 424 S.E.2d 503 (1993), be applied to non-capital cases as well as capital cases. He found a reasonable rate of compensation to be $40 per hour out-of-court and $50 per hour in-court and concluded Attorney was entitled to a total fee of $580. All parties appeal.

ISSUES

1. Does application of the statutory fees constitute a taking in this case?

2. Does Bailey apply in this case?

3. Does Attorney's appointment violate the Thirteenth Amendment?

DISCUSSION

YORK COUNTY'S AND THE STATE'S APPEAL

York County and the State contend the master erred in holding the statutory rate in effect at the time of Attorney's

representation was such a low rate of compensation as to constitute an unconstitutional taking of property. We agree this was error.

This Court recently held in South Carolina Dept. of Social Services v. Tharp, ____S.C.____, 439 S.E.2d 854 (1994), that appointment of counsel without compensation does not constitute a taking of property where the burden on the attorney is not excessive. Tharp is dispositive of the issue in this case. The record indicates Attorney's appointment did not materially affect his income for the year in question and the number of hours spent on the case was minimal. Further, in this case Attorney may claim the fees provided by statute, whereas the attorney in Tharp was totally uncompensated. Under Tharp, we find no taking here since the burden on Attorney was not excessive.

York County and the State further contend that master erred in applying our decision to Bailey in this case. In Bailey, we held the former statutory scheme for compensation in capital cases was "fundamentally unfair" given the extraordinary amount of time, effort, and commitment required of counsel in such cases. To render the statutory fees reasonable, we found the hourly rates and fee caps operated only to limit the State's liability, leaving the county to supplement as required in a given case.

The master found it was unfair not to apply the reasoning of Bailey to the case at hand. This was error for two reasons: (1) Bailey does not apply to cases tried before the Bailey decision was issued on December 7, 1992, as we held recently in Ex parte Hardaway, ___S.C. ___, 443 S.E.2d 569 (1994); and (2) Bailey distinguishes capital cases from other

criminal cases because of the required expertise and extraordinary burden borne by death penalty counsel. We find no fundamental unfairness in the application of the statutory fees in a non-capital case.

B. ATTORNEY'S APPEAL

Attorney contends the master erred in finding no violation of the Thirteenth Amendment's prohibition against involuntary servitude. As noted in the Bailey decision, an attorney admitted to the Bar in this State voluntarily submits to appointment for indigent representation by the act of taking the oath of admission. ____S.C. at ___, 424 S.E.2d at 504. Courts recognizing the voluntariness of this commitment have consistently rejected a Thirteenth Amendment challenge to appointed representation. See In re Amendments to Rules, 573 So.2d 800 (Fla. 1990) *and*

cases cited therein. Accordingly, we find no Thirteenth Amendment violation here.

CONCLUSION

We conclude the master erred in awarding fees in excess of the applicable statutory rate. Accordingly, we reverse the award of fees. In light of this disposition, we need not address the remaining issues raised by the parties.

REVERSED.

Finney, C.J., Toal, Waller, JJ., and Acting Associate Justice A. Lee Chandler, concur.

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

Melvin L. Roberts,

Respondent,

vs.

State of South Carolina, York County, a body politic and a political subdivision of the State of South Carolina, and George A. Markert, Director of Court Administration,

Appellants.

O R D E R

The following Order has been endorsed on your Petition for Rehearing in the above referenced matter:

"Petition for Rehearing is denied.

IT IS SO ORDERED.

s/Ernest A. Finney, Jr. C.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

s/John H. Waller, Jr. A.J.

Columbia, South Carolina
May 4, 1995."